Supreme Court, U.S.
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NO. 90-1412

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

State of Alabama Highway Department,
Petitioner,
v.
Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr.; Shirley Ann Boone, individually; Shirley Ann Boone on behalf of Kelley Lee Boone, the minor child and dependent of Vernon Dale Boone, Jr.; Southern Railway Company; The Alabama Great Southern Railroad Company; and Norfolk Southern Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are documents compiled in connection with highway safety improvement projects discoverable even though Congress mandated under 23 U.S.C. § 409 that such documents "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages"?

PARTIES BELOW

Parties in the Supreme Court of Alabama were petitioner State of Alabama Highway Department and respondents Southern Railway Company; Norfolk Southern Corporation; The Alabama Great Southern Railroad Company; Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr., deceased; Shirley Ann Boone, individually; Shirley Ann Boone, on behalf of Kelley Lee Boone, minor child of Vernon Dale Boone, Jr., City of Leeds, Alabama, and the Honorable William J. Wynn, Jefferson County, Alabama, Circuit Court Judge.

Subsidiaries and related corporations of Norfolk Southern Corporation, Southern Railway Company, whose name has been changed since the proceeding below to Norfolk Southern Railway Company, and The Alabama Great Southern Railroad Company include Norfolk and Western Railway Company; Atlanta and East Carolina Railway Company; Camp Lejeune Railroad Company;

Central of Georgia Railroad Company; Chesapeake Western Railway; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Georgia Northern Railway Company; Georgia Southern and Florida Railway Company; Live Oak, Perry and South Georgia Railway Company; New Orleans Terminal Company; State University Railroad Company; North American Van Lines; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; and Triple Crown Services, Inc.

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BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The respondents Southern Railway Company, The Alabama Great Southern Railroad Company, and Norfolk Southern Corporation respectfully request that this Court grant the State of Alabama Highway Department's petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Alabama is reported at 572 So. 2d 389. Petition, page A-1. The unreported order of the Jefferson County, Alabama, Circuit Court is printed in the Appendix of the Petition at page A-3.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered September 21, 1990. Petition, page A-1. The timely petition for rehearing of petitioner State of Alabama Highway Department was overruled by the Supreme Court of Alabama on December 7, 1990. Petition, page A-4-5. The

petition for writ of certiorari was timely filed by the State of Alabama Highway Department with this Court on March 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

The focus of this petition for certiorari is 23 U.S.C. § 409, which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Related statutes include 23 U.S.C. §§ 130, 144, and 152, which are set forth in the Appendix to the Petition at pages A-6 et seq.

STATEMENT OF THE CASE

Respondents adopt by reference the Statement of the Case in the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The issue set forth in the Petition for a Writ of Certiorari is an important issue which needs to be addressed by this Court because of the error of the court below. In addition to the opinions cited in the Petition, other courts construing similar statutes have agreed that such language as that found in 23 U.S.C. § 409 precludes both the discovery and the admissibility of the protected documents. Finally, as stated in the Petition, the decision of the Alabama Supreme Court frustrates the federal purpose of protecting from disclosure documents provided to states to assist them in ful-

filling their federally mandated duty to identify, evaluate or plan the safety enhancement of railroad grade crossings.

REASONS FOR GRANTING THE WRIT

I. The Issue Set Forth in the Petition for a Writ of Certiorari is of Vital Importance to all States.

The issue of whether documents compiled in connection with highway safety improvement projects which by Congressional mandate under 23 U.S.C. § 409 "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages" are nevertheless discoverable is of great significance to every state in the United States.

Federal law requires states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d) (Petition, p. A-7). This task is enormous, and could not be accomplished

without the cooperation of railroads and other citizens with respect to the gathering of information by the states. Congress recognized this and encouraged the free flow of information by adopting a statute which would make privileged all documents provided to the states in the fulfillment of their federally mandated duty. The holding of the Alabama Supreme Court rejects federal law and requires the disclosure of these privileged documents. This Court should grant the State of Alabama Highway Department's Petition and reverse the holding of the opinion below.

The process of determining which rail-highway intersections "require separation, relocation, or protective devices" of necessity involves conducting diagnostic studies at crossings and collecting "reports, surveys, schedules, lists, or data" from every possible source. 23 U.S.C. § 409. The process also requires state employees to make decisions with respect to thousands of railroad crossings. Because of the

limitation of money and manpower, obviously some crossings will be modified or improved sooner than will others.

States quickly realized that in the process of carrying out the federal mandate "to identify those railroad crossings which may require separation, relocation, or protective devices," they and their employees were going to be embroiled, if not subject to, litigation. Many states were afraid that the data they collected for the purpose of identifying and prioritizing highway hazards could be obtained and used against them in lawsuits. Quite simply, the state highway departments wanted to obtain the most information available to carry out their required duties, but understood the process was being frustrated by their own reluctance and the reluctance of others because of the likelihood that discussions and decisions about hazardous conditions or conditions which might be improved might expose them to liability.

23 U.S.C. § 409 was enacted to remove these obstacles to the accomplishment of the purposes of the Federal

Highway Safety Acts. Decisions such as was entered by the lower court in this case frustrate the intended purpose of Section 409 and jeopardize the entire federally mandated program regarding railroad crossings. This error should be corrected by this Court and the petition for a writ of certiorari sought by the State of Alabama Highway Department should be granted.

The importance of the issue of whether the documents described in Section 409 are privileged was great enough to be addressed by Congress in a federal law. Money and efforts of those involved in seeking to improve railroad grade crossings pursuant to a federal program are wasted by the ruling of the court below because the attention of those involved in the federal program is diverted to responding to the exigencies of civil litigation. This is but another example of the Supreme Court of Alabama ignoring the Supremacy Clause of the United States Constitution and should be corrected.

II. The Holding of the Alabama Supreme Court is Contrary to the Holdings of Other Courts Construing Similar Statutes.

The State of Alabama Highway Department in its Petition pointed out to the Court those opinions which have specifically considered Section 409, and correctly pointed out that this statute was intended to provide a privilege from both discovery and admissibility for the documents described therein. In addition to the decisions which have directly addressed Section 409, other courts in construing similar statutes have concluded that such statutes preclude the documents described from both discovery and admissibility. In ruling as it did, the Alabama Supreme Court rejected the sound reasoning of such opinions.

One such similar statute is 49 U.S.C. § 320(f):

> No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used

> for any other purpose, in any suit or action for damages growing out of any matter mentioned in such report or investigation.

(Emphasis added) (49 U.S.C. § 320(f) has been repealed and incorporated into 49 U.S.C. § 504(f)).

In Craddock v. Queen City Coach Company, 141 S.E.2d 798 (N.C. 1965), the plaintiff sought discovery of a statement which had been given by a bus driver following an accident. The statement was a part of the report required by federal law to be filed with the Interstate Commerce Commission. Applying 49 U.S.C. § 320(f), the Supreme Court of North Carolina held that the plaintiff was "not entitled to a copy of the report made by defendant's bus driver . . . for the purpose of making the report required by law to the I.C.C." Id. at 801. The court explained:

> In our opinion, since the above statute prohibits the introduction in evidence, or use for any other purpose, of any report made to the I.C.C. in any suit or action for damages growing out of any matter mentioned in such report, it would be violative of the spirit and purpose of the I.C.C. Act to require the defendant to

> give plaintiff the data upon which the I.C.C. report was based. To do so would make the protective provisions of the statute worthless.

141 S.E.2d at 800. Even so, to permit discovery of the documents protected under Section 409 as the Alabama Supreme Court has done in this case will cause the protective provisions of Section 409 to become "worthless."

In Irvine v. Safeway Trails, Inc., 10 F.R.D. 586 (E.D. Pa. 1950), plaintiffs sought "production of reports to the Interstate Commerce Commission." Id. at 587. The court stated that such reports were privileged under 49 U.S.C. § 320(f) and sustained the defendant's objection to the production of the reports. Id. at 587-88. Similarly, this Court, faced with a statute which is even broader than 49 U.S.C. § 320(f), should grant the petition and reverse the lower court, thus recognizing and giving full authority to Section 409.

In Blankenship v. General Motors Corporation, 428 F.2d 1006 (6th Cir. 1970), the Sixth Circuit Court of Appeals considered whether the plaintiff, an individual, could assert

the privilege provided by 49 U.S.C. § 320(f). The carrier which had prepared the report sought to use it at trial because it contained a damaging statement by plaintiff's decedent. The carrier argued that § 320(f) provided only "a limited privilege against disclosure which is exercisable only by the carrier filing the report and cannot be invoked by others." 428 F.2d at 1009. The Sixth Circuit disagreed:

> [The statute] states in a plain and unambiguous fashion that no report of an accident filed by a carrier 'shall be admitted as evidence, or used for any other purpose, in any suit . . . for damages growing out of any matter mentioned in such report. . . .' Without evidence of a contrary Congressional intent, the statute can only be read as a flat prohibition against the use of these reports or any part of them as evidence. Id.

In other words, it did not matter who asserted the privilege; the statute precluded use of the report. Similarly, Section 409 is a flat prohibition against the use or discovery of any of the documents described therein, regardless of whether the privilege is asserted by the State, the railroad or

an individual. The error of the Alabama Supreme Court and other courts which have failed to acknowledge the privilege provided in Section 409 should be corrected by this Court.

Section 409 is plain and unambiguous. Materials protected by it are not admissible and may not be considered for any other purpose, which surely means they cannot be discovered. This court should grant the petition for a writ of certiorari sought by the State of Alabama Highway Department and reverse the lower court.

CONCLUSION

That the purpose of Section 409 was to encourage full and frank disclosure of information between railroads, states and other parties and to protect state employees from the threat of litigation is clear. The enactment of this statute was a utilization of preemption under the Supremacy Clause so as to foster the greater public interest involved in an effective grade crossing safety program, by protecting the open communications necessary thereto. By its enactment, Congress

protected that public interest over any which might be involved in allowing lawsuits based on such reports, surveys and data, thus enabling the states to better fulfill their responsibilities under federal law in identifying those grade crossings in need of additional warnings, and planning and implementing improvements. Decisions such as those of the court below frustrate the Congressional purpose. The petition should be granted so that full consideration may be given to the issue raised by the State of Alabama Highway Department.

The petition for a writ of certiorari should be granted.

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